Lee Cheong Fah v Soo Man Yoke

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-155 OF 1992 CONSOLIDATED WITH CIVIL SUIT NO 22-276 OF 1991
ABDUL MALIK ISHAK J
30 MAY 1996

Contract *— Sale and purchase of land — Conditional contract — Vendor to obtain approval of state authority within three months from date of agreement — Time was essence of contract — Approval obtained but delay of 20 days — Vendor chose to continue agreement although had right to terminate — Whether vendor had waived her right to insist time was of essence — Whether there was binding contract*

Contract *— Non est factum — Illiterate person — Sale and purchase agreement — Vendor portrayed herself as illiterate — Allegation that she was not aware of nature of agreement — Vendor initialed legibly on every page of agreement — Vendor able to sign — Solicitor gave evidence that vendor understood content — Whether good defence*

Land Law *— Indefeasibility of title and interests — Misrepresentation — Transfer of land — Allegation by defendant that plaintiff obtained title in land from her through fraudulent misrepresentation — Burden of proof — Standard of proof — Whether misrepresentation as adverted to in s 340(2)(a) of National Land Code 1965 refers to fraudulent misrepresentation or innocent misrepresentation — National Land Code 1965 340(2)(a)*

The defendant was the registered proprietor of a house in Johor Bahru ('the premises'). On 24 February 1990, the plaintiff entered into a sale and purchase agreement ('the first agreement') with the defendant to purchase the premises for a sum of RM53,000. The first agreement was prepared by Mr Loo, a petition writer. The first agreement, however, did not deal with a specific restriction that existed to the premises in that there was a necessity of obtaining state approval for the disposal of the defendant's interest in the land. Thus, on 6 March 1990, the parties entered into another fresh agreement ('the second agreement') prepared by Mr Kee, a solicitor. Pursuant to cl 3 of the second agreement, the defendant should obtain the state approval within three months from the date of the second agreement, and pursuant to cl 19, time was of the essence. The defendant acknowledged receipt of RM25,270.11 as part payment of the purchase price of the premises. The balance of the purchase price was later paid by the plaintiff to Mr Kee's firm, and the duly executed memorandum of transfer in favour of the plaintiff was presented on 19 July 1990. Consequently, on that date, the plaintiff became the registered proprietor of the premises. However, despite request by the common solicitor to the defendant to deliver vacant possession of the premises and to collect the balance of the purchase price, the defendant failed to respond. The plaintiff, therefore, filed the present suit against the defendant seeking, inter alia, delivery of vacant possession of the premises and consequential damages. At

trial, Mr Kee gave evidence that the defendant signed the second agreement in his presence, and that he had explained the contents thereof in the Mandarin language which the defendant understood. Mr Kee further explained that although there was a delay of 20 days when the approval was finally obtained in clear contravention of cl 3, the defendant chose to continue with the agreement after being appraised of her legal rights. Mr Loo, who had prepared the first agreement, had also gave evidence that he had explained the contents of the first agreement to the plaintiff and the defendant. However, the defendant, who portrayed herself as an illiterate, alleged that the plaintiff had fraudulently represented to her that the second agreement was in fact a loan agreement which she must execute in order to obtain a friendly loan of RM53,000 from the plaintiff, and that she had to surrender the title deed to him as security for the loan. In any event, counsel for the defendant argued that the second agreement had ended because the approval of the state authority was obtained after the expiry of the three-month period as specified in cl 3.

Held, allowing the plaintiff's claims:

(1) Counsel for the defendant could not now raise the plea of non est factum, for such a plea did not manifest itself in the pleadings (see p 634D–E); *Farrell v Secretary of State for Defence* [1980] 1 All ER 166 followed.

(2) Even if the plea of non est factum had been raised in the pleading, that plea would not be put in motion for the defendant. The defendant's initials that appeared in every page of the second agreement, and her own signature that appeared prominently at the last page the agreement were sufficient to seal her fate. Further, there was also evidence that the defendant was a businesswoman of some standing in society (see p 635G–H).

(3) The second agreement was made 'subject to approval by the Johor State Authority'. The contingent event was fulfilled 20 days after the deadline, and with the concurrence of the defendant, time was put at large. Clause 3 of the agreement imposed an obligation on both parties to obtain the approval of the Johor State Authority and the conduct of the defendant in extending time showed her intention to carry the agreement right through. It was clear that there was a binding contract between the parties for the sale and purchase of the premises (see pp 637C and 639C, F–G).

(4) A contracting party is entitled under the law to insist on time to be of the essence of the contract but the contracting party may, if he wishes to, waive his right. This he may do by conduct or by words or by continuing negotiations without reservations (see p 639H–I); *Upperton v Nickolson* (1871) 6 Ch App 436 and *Webb v Hughes* (1870) LR 10 Eq 281 followed.

(5) Under s 340(1) of the National Land Code 1965 (' the NLC'), the plaintiff obtained an indefeasible title to or interest in the land upon registration (see p 644D).

(6) Under s 340(2)(a) of the NLC, misrepresentation is a separate ground of defeasibility from fraud. The misrepresentation as adverted to in s 340(2)(a) of the NLC refers to fraudulent misrepresentation and not innocent misrepresentation (see p 654F).

(7) To succeed on the ground of fraud and/or fraudulent misrepresentation, the defendant must prove beyond reasonable doubt that there must be clear, cogent, direct and unequivocal evidence of both fraud and/or fraudulent misrepresentation. The defendant, however, had failed to do so (see p 645F–H).

(8) Actual fraud must be proved to render an indefeasible title defeasible (see p 649G); *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 followed.

(9) At the end of the day, the allegations of fraud and/or fraudulent misrepresentation were entirely based on mere suspicion and conjecture which, in law, cannot amount to proof beyond reasonable doubt and per se insufficient to prove fraud (see p 655I); *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34 followed.

[Bahasa Malaysia summary

Defendan merupakan tuan punya berdaftar sebuah rumah di Johor Bahru ('premis tersebut'). Pada 24 Februari 1990, plaintif telah mengikat suatu perjanjian jual beli ('perjanjian pertama') dengan defendan untuk membeli premis tersebut pada harga RM53,000. Perjanjian pertama telah disediakan oleh Encik Loo, seorang penulis petisyen. Walau bagaimanapun, perjanjian pertama tidak mempunyai peruntukan yang berkenaan dengan sekatan spesifik yang wujud ke atas premis tersebut dalam ertikata adanya keperluan untuk memperolehi kelulusan negeri bagi pelupusan kepentingan defendan dalam tanah. Oleh itu, pada 6 Mac 1990, pihak-pihak telah mengikat suatu perjanjian baru ('perjanjian kedua') yang disediakan oleh Encik Kee, seorang peguamcara. Menurut fasal 3 perjanjian kedua, defendan harus memperolehi kelulusan negeri dalam tempoh tiga bulan daripada tarikh perjanjian kedua, dan menurut fasal 19, masa merupakan inti pati perjanjian. Defendan telah mengakui penerimaan RM25,270.11 sebagai sebahagian bayaran harga belian premis tersebut. Baki harga belian kemudiannya telah dibayar oleh plaintif kepada firma Encik Kee, dan memorandum pindahmilik yang disempurnakan yang memihak kepada plaintif dikemukakan pada 19 Julai 1990, dan ekoran itu, pada tarikh tersebut, plaintif menjadi tuan punya berdaftar premis tersebut. Namun demikian, walaupun peguamcara umum telah meminta defendan supaya menghantar-serah milikan kosong

premis tersebut dan memungut baki harga belian, defendan telah gagal membalas. Oleh yang demikian, plaintif memfailkan guaman ini terhadap defendan memohon, antara lain, hantar-serah milikan kosong premis tersebut dan ganti rugi yang berikutan. Di perbicaraan, Encik Kee memberi keterangan bahawa defendan telah menandatangani perjanjian kedua dalam kehadiran beliau, dan bahawa kandungan perjanjian kedua telah pun dijelaskan olehnya dalam bahasa Mandarin dan difahami oleh defendan. Encik Kee selanjutnya menjelaskan bahawa walaupun terdapat kelewatan sebanyak 20 hari dalam pemerolehan kelulusan, dan akibatnya, fasal 3 telah dilanggar, defendan telah memilih untuk meneruskan perjanjian kedua selepas diberitahu hak undang-undangnya. Encik Loo, yang telah menyediakan perjanjian pertama, juga telah memberi keterangan bahawa dia telah menjelaskan kandungan perjanjian pertama kepada plaintif dan defendan. Walau bagaimanapun, defendan, yang menggambarkan dirinya sebagai seorang yang buta huruf, mengatakan bahawa plaintif telah membuat representasi palsu kepadanya bahawa perjanjian kedua adalah pada hakikatnya suatu perjanjian pinjaman yang mesti disempurnakannya untuk mendapatkan pinjaman persahabatan sebanyak RM53,000 daripada plaintif, dan bahawa dia harus menyerah suratikatan hakmilik kepada plaintif sebagai cagaran untuk pinjaman. Bagaimanapun, peguam untuk defendan berhujah bahawa perjanjian kedua telah tamat sebab kelulusan pihak berkuasa negeri diperolehi selepas tamatnya tempoh tiga bulan seperti yang ditetapkan dalam fasal 3.

Diputuskan, membenarkan tuntutan plaintif:

(1) Peguam bagi defendan tidak boleh membangkitkan alasan non est factum sekarang kerana alasan sedemikian tidak terdapat dalam pliding (lihat ms 634D–E); *Farrell v Secretary of State for Defence* [1980] 1 All ER 166 diikut.

(2) Jika pun alasan non est factum telah dibangkitkan dalam pliding, defendan tidak akan dibenarkan menggunakannya. Parap defendan yang terdapat pada setiap muka surat perjanjian kedua, dan tandatangannya sendiri yang menonjol di muka surat akhir perjanjian tersebut adalah mencukupi bagi menentukan takdirnya. Selanjutnya, juga terdapat bukti bahawa defendan merupakan seorang ahli perniagaan wanita yang dikenali dalam masyarakat (lihat ms 635G–H).

(3) Perjanjian kedua telah dibuat 'tertakluk kepada kelulusan oleh Pihak Berkuasa Negeri Johor'. Peristiwa kontinjen telah dipenuhi 20 hari selepas tarikh akhir, dan dengan persetujuan defendan, masa tidak lagi merupakan inti pati. Fasal 3 perjanjian tersebut mengenakan kewajipan ke atas kedua-dua pihak untuk memperolehi kelulusan Pihak Berkuasa Negeri Johor dan kelakuan defendan dalam melanjutkan masa menunjukkan niatnya untuk menyempurnakan perjanjian. Adalah jelas bahawa terdapat

kontrak yang mengikat antara pihak-pihak bagi jualan dan belian premis tersebut (lihat ms 637C dan 639C, F–G).

(4) Di bawah undang-undang, suatu pihak yang mengikat kontrak adalah berhak menegas supaya masa menjadi inti pati kontrak tetapi pihak yang mengikat kontrak boleh mengetepikan haknya jika dia ingin berbuat begitu. Dia boleh berbuat demikian menerusi kelakuan atau perkataan-perkataan atau dengan meneruskan perundingan tanpa reservasi (lihat ms 639H–I); *Upperton v Nickolson* (1871) 6 Ch App 436 dan *Webb v Hughes* (1870) LR 10 Eq 281 diikut.

(5) Di bawah s 340(1) Kanun Tanah Negara 1965 ('KTN'), plaintif telah memperolehi suatu hakmilik yang tidak boleh disangkal kepada atau kepentingan dalam tanah pada pendaftaran (lihat ms 644D).

(6) Di bawah s 340(2)(a) KTN, salah nyata merupakan satu alasan boleh disangkal yang berasingan daripada fraud. Salah nyata seperti yang dirujuk dalam s 340(2)(a) KTN merujuk kepada salah nyata fraud dan bukan salah nyata ikhlas (lihat ms 654F).

(7) Bagi membolehkan alasan fraud dan/atau salah nyata fraud berjaya, defendan haruslah membuktikan melampaui keraguan munasabah bahawa terdapat bukti jelas, meyakinkan dan langsung tentang kedua-dua fraud dan/atau salah nyata fraud. Walau bagaimanapun, defendan telah gagal berbuat demikian (lihat ms 645F–H).

(8) Fraud sebenar mestilah dibuktikan supaya menyebabkan suatu hakmilik yang tak boleh disangkal boleh disangkal (lihat ms 649G); *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 diikut.

(9) Kesudahannya, pengataan fraud dan/atau salah nyata fraud pada keseluruhannya berdasarkan sangsi semata-mata dan dugaan yang tidak boleh diterima sebagai bukti melampaui keraguan munasabah di sisi undang-undang dan per se tidak mencukupi untuk membuktikan fraud (lihat ms 655I); *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34 diikut.]

[*Editorial Note*: There was an earlier suit; Civil Suit No 22–276–1991 by the defendant against the plaintiff based on fraud and fraudulent misrepresentation. All the parties agreed that the decision of the court in regard to this suit shall bind the parties in Civil Suit No 22–276–1991.]

Notes

For cases on sale and purchase of land, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2063–2136.

For cases on non est factum, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1917–1925.

For cases on indefeasibility of title and interests, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1837–1896. A

Cases referred to

Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid [1996] 2 CLJ 455 B
Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47
Apoo s/o Krishnan v Ellamah d/o Ramasamy [1974] 2 MLJ 201
Assets Co v Mere Roihi [1905] AC 176
Chang Fook Shen v Tan Suan Sim [1980] 1 MLJ 105
Chu Choon Moi v Ngan Sew Tin [1986] 1 MLJ 34
Combe v Combe [1951] 1 All ER 767 C
Datuk Jagindar Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196
Datuk Jagindar Singh & Ors v Tara Rajaratnam [1986] 1 MLJ 105
Eastham (Inspector of Taxes) v Leigh London and Provincial Properties Ltd [1971] 1 Ch 871
Farrell v Secretary of State for Defence [1980] 1 All ER 166 D
Goh Hooi Yin v Lim Teong Ghee & Ors [1990] 3 MLJ 23
Jasbir Kaur & Anor v Tharumber Singh [1974] 1 MLJ 224
Letchemy Arumugam v N Annamalay [1982] 2 MLJ 198
M Ratnavale v S Lourdenadin [1988] 2 MLJ 371
Moody v Cox & Anor [1916-17] All ER Rep 548
Murugan v Lew Chu Cheong [1980] 2 MLJ 139 E
National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211
Ong Boon Pok Realty Co (Pte) Ltd v Chiang Hong (Pte) Ltd [1982] 1 MLJ 242
Ong Kim Khoon v Gaya Filem Bhd [1979] 1 MLJ 79 F
Owe Then Kooi v Au Thiam Seng & Anor [1990] 1 MLJ 234
Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd [1988] 3 MLJ 54
Public Finance Bhd v Narayanasamy [1971] 2 MLJ 32
Saminathan v Pappa [1981] 1 MLJ 121
Saunders v Anglia Building Society [1971] AC 1004 G
See Keng Wah v Lim Tew Hong [1957] MLJ 137
Stuart v Kingston (1923) 32 CLR 309
Sudbrook Trading Estate Ltd v Eggleton [1982] 3 All ER 1
The First National Bank of Chicago v Tan Lai Wah [1981] 2 MLJ 100
Thoroughgood's Case, Thoroughgood v Cole (1584) 76 ER 408 H
Upperton v Nickolson (1871) 6 Ch App 436
Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd (1923) NZLR 1137
Watson v Phipps (1985) 60 ALJR 1
Webb v Hughes (1870) LR 10 Eq 281
Yeoh Cheng Han v Official Administrator, Malaya [1972] 2 MLJ 7 I

Legislation referred to

Contracts Act 1950 ss 18, 19
Evidence Act 1950 s 114(g)
National Land Code 1965 s 340(2)(a)

Ho Thian Cheh (*Ho Thian Cheh & Co*) for the plaintiff in Civil Suit No 22–155 of 1992 and for the defendant in Civil Suit No 22–276 of 1991.

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Cur Adv Vult

Abdul Malik Ishak J: All the parties to the above-mentioned suits agreed that the decision of this court in regard to Civil Suit No 22–155 of 1992 ('the 1992 suit') would bind the parties in Civil Suit No 22–276 of 1991 ('the 1991 suit'). This magnanimous gesture by the parties have certainly reduce precious judicial time which should be emulated by all the legal practitioners at the bar. The thrust of the defence in the 1992 suit and the gravamen of the plaintiff's claim in the 1991 suit rest on fraud and fraudulent misrepresentation; these points will certainly be dealt with in this judgment at some length as can be seen later. For the purpose of this judgment, I shall focus my attention to the 1992 suit.

The plaintiff sued the defendant for vacant possession of a house at SQ No 27 Pandan New Village, Pandan, Johor Bahru which was built on a piece of land comprised in HS(D) 102093, Lot 1977, Mukim Tebrau, district of Johor Bahru (hereinafter referred to as 'the said premises'). The defendant was the registered proprietor of the said premises and there was evidence that the plaintiff entered into a sale and purchase agreement with the defendant for the purchase of the said premises on 6 March 1990 as reflected in exh P2 for a sum of RM53,000. Paragraphs 1 and 2 of the statement of claim bore testimony to this and the plaintiff further sought pecuniary loss/damages arising from the defendant's wilful refusal to deliver vacant possession of the said premises on 5 August 1990 at the rate of RM500 per month with effect from 5 August 1990 right up to the date when possession would be delivered to the plaintiff together with the ancillary interest and costs. The quantum was adverted to by the plaintiff when he took the stand and it was urged upon me that that was the appropriate and reasonable quantum to adopt and apply in the circumstances.

The plaintiff's case was fairly straightforward. The plaintiff testified that he executed exh P2 in the office of Messrs Mak Ng Shao & Kee and particularly in the presence of a solicitor by the name of Mr Kee Hun Kiet (SP3 — 'Mr Kee'). Incidentally, there was evidence that at that material

time, the defendant, as the vendor of the said premises, was also present and she signed exh P2 in the presence of Mr Kee. It was an undeniable fact that Mr Kee took pains in explaining the contents of exh P2 to the vendor defendant in the Mandarin language — the same language which the defendant used whilst testifying in open court. Mr Kee was cross-examined and he categorically stated in no uncertain terms at p 89 of the first segment of the notes of evidence to the effect that:

> ... I cannot describe the lady (referring to the defendant) as illiterate. I felt I could communicate with her in Chinese Mandarin. She understood my Chinese Mandarin and I understood her Chinese Mandarin. We understood one another perfectly.

It is germane to pause and observe that the defendant who portrayed herself as an illiterate initialled all the pages in exh P2 legibly and this damning piece of evidence was not challenged by Encik Mohamed Hanipa bin Maidin, the learned counsel for the defendant in the 1992 suit; nor by Encik Noordin Hussin, the learned counsel for the plaintiff in the 1991 suit. These learned counsels took the correct course when they did not question the defendant in the 1992 suit in regard to those initials that appeared in exh P2 and they cannot now turn around to raise the plea of non est factum, for such a plea did not manifest itself in the pleadings (see the speech of Lord Edmund Davies in *Farrell v Secretary of State for Defence* [1980] 1 All ER 166 on the importance of pleadings as cited in *Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid* [1996] 2 CLJ 455 especially at p 460). The plea of non est factum had its roots in 1584 as seen in the case of *Thoroughgood's Case, Thoroughgood v Cole* (1584) 76 ER 408. Speaking generally, a party who is of full age and capable of understanding is said to be bound by his signature that appears in a document; but a party who is misled into signing a document which is essentially different from that which he intended to sign can plead non est factum in an action filed in court against him and consequently, that very document is considered void and of no effect: see *Chitty on Contracts* (26th Ed) at para 363. Lord Wilberforce elaborated on the principle of non est factum in *Saunders v Anglia Building Society* [1971] AC 1004 (HL) especially at p 1026 in these words:

> How, then, ought the principle, on which a plea of non est factum is admissible, to be stated? In my opinion, a document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, that is, more concretely, when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended. Many other expressions, or adjectives, could be used — 'basically' or 'radically' or 'fundamentally'. In substance, the test does not differ from that which was applied in the leading cases of *Thoroughgood's Case, Thoroughgood v Cole* (1584) 76 ER 408 and *Foster v Mackinnon* (1869) LR 4 CP 704, except in moving from the character/contents distinction to an area in better understood modern practice.

In the same vein and in the same case, Viscount Dilhorne at p 1021 said:

What are the matters which have to be established for the plea to succeed? First, in my opinion, it must be shown that the document signed was radically different in character from that which the signer thought it was. In *Foster v Mackinnon* (1869) LR 4 CP 704 the defendant had been deceived into indorsing a bill when he believed it to be a guarantee. Byles J, delivering the judgment of the court, said at p 711:

> It seems plain, on principle and authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.

It is to be observed that Byles J did not say that failure to read the contract by a person who could read was of itself negligence debarring him from repudiating his signature. He recognized that there might be cases where person forbore to read without being negligent.

In the very same case, Lord Pearson at p 1034 continued in the same vein:

> In my opinion, the plea of non est factum ought to be available in a proper case for the relief of a person who for permanent or temporary reasons (not limited to blindness or illiteracy) is not capable of both reading and sufficiently understanding the deed or other document to be signed. By 'sufficiently understanding' I mean understanding at least to the point of detecting a fundamental difference between the actual document and the document as the signer had believed it to be. There must be a proper case for such relief. There would not be a proper case if (a) the signature of the document was brought about by negligence of the signer in failing to take precautions which he ought to have taken, or (b) the actual document was not fundamentally different from the document as the signer believed it to be.

It is my judgment that even if the plea of non est factum had been raised in the pleading, that plea will not be put in motion for the defendant. The reason is fairly simple. Apart from her initials that appeared in every page of exh P2, her own signature appeared prominently at the last page of exh P2 and that is sufficient to seal the fate of the defendant. Another reason would be this. There was evidence that the defendant was a businesswoman of some standing in society. She used to be a dealer in furniture, and once upon a time, was a hairdresser and a seamstress in that order. Surely a woman of her standing in society cannot be said to be illiterate.

Going back to the mainstream of the case, there was evidence that upon execution of exh P2, the defendant acknowledged receipt of RM25,270.11 as part payment of the purchase price of the said premises and this can clearly be seen at cl 1 of exh P2 in the bundle at 'AABD' at

p 60. The breakdown of RM25,270.11 can be seen in the form of a cheque amounting to RM5,000 issued in favour of the defendant at bundle AABD at p 49 together with the receipt thereof at p 50 of the same bundle. The balance of RM20,270.11 was paid to Visia Finance Bhd by the plaintiff on behalf of the defendant. It was not in dispute that both the plaintiff and the defendant signed an earlier agreement of sale and purchase of the said premises of 24 February 1990 as reflected in exh P1 at pp 46–48 of bundle AABD. Mr Loo Choon Kwong (SP2 — 'Mr Loo') testified that he prepared and typed exh P1 for the vendor defendant and the purchaser plaintiff and that he had explained the contents of exh P1 to both of them. Mr Loo elaborated further in cross-examination that he explained the contents of exh P1 to the defendant in the Hakka dialect. Mr Loo remembered vividly that both the plaintiff and the defendant spoke to him in the Hakka dialect. Notwithstanding that there was exh P1, Mr Kee testified that it was he who advised the execution of exh P2 as exh P1 was not thorough as it did not deal with a specific restriction that existed to the said premises in that there was a necessity of obtaining state approval for the disposal of the defendant's interest to the land comprised in HS(D) 102093, Lot 1977, Mukim Tebrau, district of Johor Bahru. It was with this impediment in mind that Mr Kee prudently incorporated cll 3, 4 and 5 in exh P2 as reflected at pp 61 and 62 of bundle AABD. Mr Kee testified that on 26 June 1990, the state approval was duly obtained as can be seen at p 68 of bundle AABD and immediately thereafter this was followed by swift action on the part of the plaintiff when he paid the balance of the purchase price at RM27,729.89 in total compliance with cl 5 of exh P2 at p 61 of bundle AABD. Mr Kee played his part well, for in due course he presented the duly executed memorandum of transfer by the defendant in favour of the plaintiff on 19 July 1990 and consequently, on that date, the plaintiff became the registered proprietor of the said premises. It is the plaintiff's case that in accordance with cll 6 and 10 of exh P2 at pp 62 and 63 of bundle AABD, the defendant was duty bound to deliver vacant possession of the said premises to the plaintiff upon payment of the balance of the purchase price. Encik Noordin Hussin ably argued that exh P2 had come to an abrupt end because the approval of the state authority was obtained after the expiry of three months as specified in cl 3 of exh P2. It was said that the last date for obtaining the approval of the state authority would be on 6 June 1990 and consequently, when the approval was finally obtained on 26 June 1990 there was a delay of 20 solid days — in clear contravention of cl 3 of exh P2. Clause 19 of exh P2 specifically states that time shall be the essence of the contract and flowing from this, it was argued that time was thrown out of the window when the state authority gave its approval on 26 June 1990. It was in evidence — and this can be seen at pp 72 and 73 of the first segment of the notes of evidence — that when both the parties appeared before Mr Kee on 16 July 1990 he proceeded to explain to the defendant that she had the right to terminate the sale and purchase agreement and refund that deposit or, with her consent, to extend the agreement. The defendant, being appraised of her

A legal rights, sought to continue with the agreement in exh P2 and this prompted Mr Kee to present the duly executed memorandum of transfer in favour of the plaintiff on 19 July 1990. Clause 3 of exh P2 must now be referred to and for convenience, it is reproduced hereinunder:

> 3 The vendor shall at its own costs and expense apply to the Johore State
B Authority for the approval of acquisition of the said property by the purchaser and the vendor shall endeavour and cause to be obtained such approval by the Johore State Authority within three (3) months from the date of this agreement hereof. The purchaser shall assist the vendor in whatever manner necessary in obtaining the relevant approval.

C Without a doubt the sale and purchase agreement between the parties was made 'subject to approval by the Johore State Authority'. It is here that I have to play a role to determine the intention of the parties by construing the agreement as a whole and at the same time to sieve through the oral testimonies of all the witnesses that testified in open court. Buckley LJ in *Eastham (Inspector of Taxes) v Leigh London & Provincial Properties Ltd*
D [1971] 1 Ch 871 made an apt observation to this effect (at p 891):

> That is not, in my judgment, a condition precedent to the contract at all, it is part of the terms of the contract. You may call it a condition if you please, but it does not make it a condition precedent to the existence of a contract, it merely indicates what is part of the terms of the bargain, just as in all
E contracts for sale the terms of the bargain are customarily described as conditions of sale.

In the Federal Court case of *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211, Salleh Abas CJ (Malaya) (as he then was) differentiated between a contingent condition and a promissory condition in this way (at p 219):
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> A contingent condition, as we have already referred it, is a provision in a contract to the effect that the contract shall not take effect unless and until the condition is fulfilled, and the non-fulfilment of the condition does not render either party liable in damages to the other; whilst a promissory condition, on the other hand, is an essential term of the contract, the breach
G of which entitles the innocent party to break itself as discharged from the contract and to sue for damages.

The Singapore High Court in *Ong Boon Pok Realty Co (Pte) Ltd v Chiang Hong (Pte) Ltd* [1982] 1 MLJ 242 held that the clause which was added to the sale and purchase agreement — which provided that the agreement
H was entered into on the basis that the government would approve the sale to the purchaser who was not a Singapore citizen — rendered the contract conditional upon the approval being granted. The court further held that the intention of the parties was clearly to enter into a conditional contract, especially since the parties knew that without the approval of the Singapore Government, the sale could not be effected. It must be noted that
I Sinnathuray J faithfully followed the decision of the Privy Council in *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47 (PC), even though he found that the conditional character of the agreement was not

expressed as clearly as was provided in the agreement in *Aberfoyle*'s case; nor did the said agreement specify as in *Aberfoyle* that if the condition was not fulfilled the agreement shall be null and void. Sinnathuray J put it in this way (at p 248):

> But I am not persuaded by Mr Price that the differences distinguish the present case from *Aberfoyle*'s case, for the reason that I have given that once it is concluded that the true construction of the side letter read with the agreement is that there was a conditional contract, then the facts in the present case are indistinguishable from the facts in *Aberfoyle*'s case. Both concern conditional contracts relating to the sale and purchase of land. Both contain stipulations fixing dates for the completion of the sales. The reasoning had in *Aberfoyle*'s case must therefore apply to the facts in the present case that 'until the condition is fulfilled there is no contract of sale to be completed'.

Back home in Malaysia, the Federal Court had occasion to consider whether a condition in a contract for the sale of a property which provided that the purchaser had to obtain the approval of the Foreign Investment Committee rendered the contract a conditional one. This was the case of *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd.* The Foreign Investment Committee refused to give its approval and suggested that the property be transferred to a joint venture company of which at least 30% of its equity be held by Bumiputras. The respondents contended that the agreement became void when the Foreign Investment Committee refused to approve the sale, while the appellants maintained that the agreement did not become void but still subsisted because there was conditional approval. The learned trial judge held that the agreement became void and he made several consequential orders. The appellants appealed. The Federal Court agreed with the decision of the learned trial judge and held that the agreement became void because of the refusal of the Foreign Investment Committee to approve the sale over which neither the appellants nor the respondents had control and therefore the various consequential orders made by the learned trial judge were held to be valid. Salleh Abas CJ (Malaya) (as his Lordship then was), speaking for the Federal Court, described the nature of the condition and the agreement in these words (at p 218I):

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled. (See *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 KB 297 at p 304 per Denning LJ and *Property and Bloodstock Ltd v Emerton; Bush v Property and Bloodstock Ltd* [1967] 3 All ER 321 at p 330 per Sachs LJ. Until the FIC approval was given liability for further performance remained unenforceable, ie suspended

A although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is in effect laid down by s 33 (a) of the Contracts Act which enacts —

33(a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until
B that event has happened.

As the approval in this case was refused it means that contingent event becomes impossible and the agreement therefore becomes void in accordance with s 33 (b) of the Contracts Act, which is as follows:

33(b) If the event becomes impossible, such contracts become void.

C Here, unlike the case of *National Finance Co-operative Society Ltd v Sharidal Sdn Bhd,* the contingent event was fulfilled 20 days after the deadline, and with the concurrence of the defendant, time was put at large. I have seen Mr Kee perform in the witness box and I have no hesitation to believe him when he said that he advised the defendant in regard to her legal rights
D whether to proceed or to terminate forthwith the sale and purchase agreement. Mr Kee had an impeccable background. Though he had been in practice for less than a decade, yet during that period he had handled thousands of conveyancing cases. His forte was conveyancing law and he should know what to do; and I so hold that he knew what to do. Even though cl 3 of exh P2 was not happily worded, it cannot detract the parties
E from their responsibilities under the contract. It is perhaps opportune for me to say that in drafting a conditional contract where the approval of a third party is required by law before a contract can be enforced, just like the present case before me, it should be made clear that the contract entered into between the parties is subject to such an approval. The parties
F should include a provision in the contract specifically stating that in the event that the approval is not obtained, the agreement shall be rendered null and void and that all money paid, including those by way of deposit, shall be refunded to the other party. Clause 3 of exh P2 imposes an obligation on both parties to obtain the approval of the Johore State Authority, and the conduct of the vendor defendant in extending time
G shows her intention to carry the agreement right through. There was no uncertainty in cl 3 of exh P2 like what was experienced in the case of *Sudbrook Trading Estate Ltd v Eggleton* [1982] 3 All ER 1, and I have no qualms to rule that there was a binding contract between the parties for the sale and purchase of the said premises.

H It must be remembered that a contracting party is entitled under the law to insist on time to be of the essence of the contract but the contracting party may, if he wishes to, waive his right. This he may do by conduct or by words or by continuing negotiations without reservations: *Upperton v Nickolson* (1871) 6 Ch App 436. Of pertinence would be the speech of Sir R Malins VC in *Webb v Hughes* (1870) LR 10 Eq 281 at p 286 when he
I said in erudite terms:

> But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the

> parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated.

Reverting back to the mainstream of the case, it was not in dispute that the balance of the purchase price had been paid to the firm of the common solicitor, to wit, Messrs Mak Ng Shao & Kee of which Mr Kee was a partner. By letter dated 31 July 1990, the said law firm requested the defendant to hand over the keys to the said premises and to collect the balance of the purchase price (see p 117 of bundle AABD). The defendant failed to respond. This prompted the common solicitor to forward another letter dated 7 August 1990 to the defendant and in that letter, a further request was made to the defendant to hand over the keys and to collect the balance of the purchase price (see p 118 of bundle AABD). Again, there was no response. By letter dated 15 August 1990, Messrs Leng & Co — at the behest of the plaintiff — wrote to Messrs Mak Ng Shao & Kee and requested the latter to advise the defendant to deliver vacant possession of the said premises to the plaintiff by handing over the keys to the said premises within seven days from the date therein (see p 120 of bundle AABD). The defendant must have ignored this letter for there was no response from her. Messrs Mak Ng Shao & Kee acted prudently and by letter dated 16 August 1990 — as reflected at p 121 of bundle AABD — they extended a copy of the letter from Messrs Leng & Co to the defendant. There was total silence from the defendant; no response at all was forthcoming from her. This prompted the plaintiff to file the present suit against the defendant seeking, inter alia, delivery of vacant possession of the said premises from the defendant together with a claim for damages arising from the defendant's failure to deliver vacant possession in accordance with the spirit and intendment of the contract as per exh P2.

As far as the law is concerned, it is now settled that the plaintiff must prove his case on the balance of probabilities. Indeed, the strong bench of the Federal Court comprising Suffian, Gill and Ali FJJ ruled that the plaintiff there was entitled to succeed if there was no inherent improbability in his evidence: *Yeoh Cheng Han v Official Administrator, Malaya* [1972] 2 MLJ 7. In the present case before me, the evidence of the plaintiff was not only probable but there was cogent evidence to support it. I accepted the plaintiff's evidence for the following reasons:

(1) It was consistent with the contemporaneous documentary evidence. Rajah J, speaking for the Singapore Court of Appeal in the case of *The First National Bank of Chicago v Tan Lai Wah* [1981] 2 MLJ 100, remarked that (at p 103):

> Where oral self-interested testimony is conflicting on a particular matter and there is contemporaneous or near contemporaneous documentary evidence relevant to the matter before the court, such evidence should,

A in our view, be also given due consideration by the court, particularly if such documents came into existence long before the matter in question became one of dispute between the parties, before it makes a finding on the matter in issue. There can, in our view, be no more disinterested, reliable or weighty evidence than this.

B (2) There was an independent corroboration by the common solicitor in the person of Mr Kee in all material particulars. Encik Mohamed Hanipa bin Maidin, the learned counsel for the defendant, argued and drove home the point that Mr Kee was not an independent witness. Reliance was placed on two authorities, namely, *Chang Fook Shen v Tan Suan Sim* [1980] 1 MLJ 105 and *Moody v Cox & Anor* C [1916–17] All ER Rep 548. Gunn Chit Tuan J (as he then was) in *Chang Fook Shen v Tan Suan Sim* said (at p 106):

It must be pointed out at this stage that the Federal Court has in its recent judgment in *Ong Kim Khoon v Gaya Filem Bhd* [1979] 1 MLJ 79 (FC) referred to the undesirability of the same solicitor acting for both vendor D and purchaser. In that case, their Lordships referred to the view of Bray CJ in *Jennings v Zihari-Kiss* [1972] 2 SA SR 493 that

> ... it is not only undesirable but wrong, whether the adviser in question is a solicitor or a land agent. It is impossible for the same person to give satisfactory service as the confidential and expert adviser of both parties with conflicting interests. The man who undertakes to serve two masters E may easily find himself in the position where he must be false to one and possibly to both ....

Later, in the course of his judgment Gunn Chit Tuan J accepted the evidence of the common solicitor when he said at the same page:

F Although it was undesirable and wrong for the same solicitor to have acted for both the vendor and the purchaser in this case and it has happened that Mr Ajmeer Singh Sandhu did not advise the defendant on the usual practice concerning the sale and transfer of a property, the important point, as I saw it in this case, was whether the defendant had, contrary to the usual practice, in fact expressly agreed to accept the balance of the purchase price G after executing a transfer. After listening to the evidence of Mr Ajmeer Singh Sandhu in his examination-in-chief as well as under cross-examination, I was satisfied and found that he was a witness of truth and that the defendant had in fact told him in April 1974 that she was willing to execute the transfer to be sent to the bank's solicitors, Messrs Presgrave and Matthews, to enable the plaintiff's loan to be released.

H In *Moody v Cox & Anor*, Lord Cozens-Hardy MR posed a very interesting question as to the fiduciary relationship between a solicitor and his client and at the same time his Lordship gave the answer. That question and answer were framed in this manner (at p 550):

I What is the duty of a solicitor standing in this fiduciary relation towards his client? If he, the solicitor, desires to buy or sell the property — I care not which way it is, for the obligations would be just the same in their nature if it were a sale to the client or a sale to the solicitor — I know of no better

authority to settle the principles applicable to the case than Lord Eldon's judgment in *Gibson v Jeyes* (1801) 6 Ves 266, where he said this (6 Ves 266 at p 278): A

> If (the solicitor) will mix up with the character of attorney that of vendor he shall if the propriety of the contract comes in question, manifest that he has given (the client) all that reasonable advice against himself that he would have given her against a third person. B

There are more passages to the same effect in that judgment than the one that I have read. Thus, there is another passage (ibid at p 271):

> But, from the general danger, the court must hold that, if the attorney does mix himself with the character of the vendor, he must show to demonstration, for that must not be left in doubt, that no industry he was bound to exert would have got a better bargain. C

The relief in a case of this kind does not depend upon undue influence. That is not the ground on which I base my present judgment. There may be cases in which undue influence is proved as a fact, but the principle to decide this case upon in my view is this. An attorney selling to a client or buying from a client is bound to disclose everything that is material or may be material to the judgment of his client before the transaction is completed. The duty to disclose is quite consistent with the absence of undue influence, and that is all that seems to me to be involved here. Counsel for Mr Cox said that the solicitor here had not any undue influence over the client, who was an independent man of business and would not have looked to him for advice on the propriety of the transaction, and therefore, there is no liability. The answer is I expect that the liability does not depend upon undue influence. I adopt the judgment of Fry J in *Davies v London and Provincial Marine Insurance Co* ((1878) 8 Ch D 469 at p 474): D E

> If there be a pre-existing relationship between the parties, such as that of ... solicitor and client ... then if the parties can contract at all they can only contract after the most ample disclosure of everything by ... the solicitor (to the client). F

That being the principle, it is quite apparent to my mind that that disclosure never was made in the present case.

The principles enunciated in these two cases are certainly sound but they can never be applied indiscriminately to all cases without regard to the facts of each case. Though it was undesirable to have a common solicitor, yet there was evidence that Mr Kee advised the defendant to secure a separate solicitor when she and her relative complained that the said premises was sold at a lower value. The same advice was also extended to the plaintiff, who then retained Messrs Leng & Co to act for him (see p 74 of the first segment of the notes of evidence). Mr Kee acted prudently and I need do no better than to refer to the notes of evidence at pp 75 and 76 of the first segment and for convenience, they are reproduced hereinunder: G H

Question: Did the vendor (referring to the defendant) at any time tell you that in fact the transaction was meant to be a loan transaction? I

Answer: No.

Question: Did she at any time mention the fact that the RM53,000 stipulated as the price of the said land as the sum lent by the purchaser to her?

Answer: No.

Question: When the vendor (referring to the defendant) executed the transfer form (the borang pindah milik), did you explain to her what it was all about?

Answer: Yes, I did.

At this juncture, the erudite observations of Wong Kim Fatt JC in *Letchemy Arumugan v N Annamalay* [1982] 2 MLJ 198 especially at p 201 should be rekindled and it merits reproduction:

> Where a party, especially an ignorant or illiterate one, is unrepresented by an advocate and solicitor in a transaction and the opposite party is represented by one, it is the duty of the advocate and solicitor to explain the terms and conditions of the contract and the legal consequences thereof fully and frankly to the unrepresented party and ensure that this unrepresented party understands the terms and conditions and legal consequences fully, so that neither of the contracting parties has any unfair advantage over the other. Where there is a conflict of interest, as in this case, the advocate and solicitor should advise the plaintiff to be separately represented. The advocate and solicitor must at all times maintain his professional ethics, honesty, integrity and independence. He should never abuse his special position and the confidence reposed in him ...

The defendant should not complain as she was well advised by Mr Kee; after all, he had acted for her on two other occasions. One was in regard to a loan of RM20,000 which was advanced by Visia Finance Bhd sometime in December 1989, as reflected at p 76 of the first segment of the notes of evidence; and the other was on a matter pertaining to a promissory note as reflected at pp 111 and 112 of the bundle at AABD. There was not a shred of evidence to show that Mr Kee withheld information which was material or may be material, and which information may affect the defendant's judgment before she entered into the contract in exh P2. In fact, Mr Kee was quite emphatic when he said that the application for obtaining approval from the state authority was signed by both the plaintiff and the defendant. Surely that was an act of fairness and acting within the ambit of cl 3 of exh P2 on the part of Mr Kee. It is my judgment that Mr Kee was an exemplary witness who gave evidence in a highly spontaneous manner, wholly consistent with the character of a witness of truth and more importantly one must not forget that he had nothing to gain by telling anything but the truth.

(3) There was nothing inherently improbable about the evidence of the plaintiff. It was a pure simple case of a transaction involving the sale and purchase of the said premises at arm's length. At the end of the day, it is my duty to construe the contract as per exh P2 in order to ascertain what the parties meant by the words they have employed.

The Privy Council in *Watson v Phipps* (1985) 60 ALJR 1, on an appeal from Queensland, Australia observed in trenchant terms that:

> The function of a court of construction is to ascertain what the parties meant by the words which they have used. For this purpose the grammatical and ordinary sense of the words is to be adhered to, unless they lead to some absurdity or to some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further; see the speech of Lord Wensleydale in *Grey v Pearson* (1875) 6 HLC 61, repeated by Lord Blackburn in *Caledonian Railway Co v North British Railway Co* (1881) 6 App Cas 114 at p 131.

Applying *Watson v Phipps,* I hold and it is my judgment that there was a valid and binding contract between the plaintiff and the defendant for the purchase of the said premises.

It was not in dispute that the title to the said premises has been registered in the name of the plaintiff, as reflected at p 8 of bundle AABD. Under s 340(1) of the National Land Code 1965 ('the NLC'), the plaintiff obtains an indefeasible title to or interest in the land upon registration — in law, it is a title or an interest which is free of all adverse claims or encumbrances not noted on the register. The defendant says that that indefeasibility is not absolute as it is tainted by fraud and/or misrepresentation and that the onus of proof to show that there was indeed fraud must necessarily lie with the defendant — the onus would be beyond reasonable doubt: *Saminathan v Pappa* [1981] 1 MLJ 121; *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1986] 1 MLJ 105. I venture to say that for fraudulent misrepresentation, the defendant must necessarily prove beyond reasonable doubt.

I shall now proceed to examine the defence version. It was averred in the statement of defence that the plaintiff became the registered proprietor of the said premises by unlawfully and fraudulently obtaining 'the transfer of title from the defendant'. It was averred at para 9 of the statement of defence that negotiations between the plaintiff and the defendant led to a friendly loan of RM53,000 'on condition that the defendant executes a loan agreement and surrender the title deed to him as security for the loan.' It was further averred that 'the plaintiff represented that he would charge a very low interest which is much lower than the finance company.' As the evidence unfolded according to the defendant, the plaintiff took the defendant to a petition writer by the name of Mr Loo and subsequently to the law firm of Messrs Mak Ng Shao & Kee to execute the loan agreement. It was said that the plaintiff made further representations to the defendant to the following effect:

(a) that the agreement she was signing was a loan agreement;

(b) that he would pay a certain sum of money to Visia Finance Bhd to redeem the title; and

(c) that he would pay the balance sum of RM53,000 at a later period.

It was said that the defendant acted on the truth of these representations and accordingly, executed the loan agreement dated 6 March 1990 together with other related documents connected to the loan. Sometime in August 1990, the defendant made a startling discovery to the effect that these representations were false in material particulars in that:

(a) the agreement dated 6 March 1990 was a sale and purchase agreement of the said premises and not a loan agreement;

(b) the payment to Visia Finance Bhd was part payment of the purchase price of the said premises and not part payment of the friendly loan;

(c) the application to obtain the consent of the state authority was a document which had nothing to do with the friendly loan — rather, it related to the transfer of the said premises in favour of the plaintiff;

(d) the plaintiff had illegally and fraudulently obtained the consent of the state authority in regard to the sale of the said premises by the defendant to the plaintiff; and

(e) the plaintiff had fraudulently colluded with some others to illegally obtain the registration of the transfer in favour of the plaintiff without the knowledge and consent of the defendant.

On this set of facts, the defendant lodged a police report vide JBR 15554/90 on 30 July 1990 at 4.12 pm, as reflected at p 1 of bundle 'NABD' which was marked as 'D3'. The defendant, too, lodged a private caveat after she discovered the fraud and the misrepresentation that was 'committed against her.' For these reasons, it was said that the plaintiff's title to the said premises was defeasible and consequently, it was argued that he was not entitled to the vacant possession and the ancillary damages which he sought.

In my judgment, to succeed on the ground of fraud and/or fraudulent misrepresentation, the defendant must prove beyond reasonable doubt that there must be clear, cogent, direct and unequivocal evidence of both fraud and/or fraudulent misrepresentation. Unless there was such evidence, this court was not in a position to make a finding as to fraud or, for that matter, fraudulent misrepresentation. One must be clear in approaching the issue of fraud in that fraud is not a matter of inference or mere simple deduction. It is correct to say that there must be present clear, unequivocal, categorical, direct and cogent evidence before a court of law — particularly this court — can make a finding of fraud or fraudulent misrepresentation in the context of the standard of proof that was required of the defendant. The germane question to pose would be this: has the defendant succeeded in adducing such evidence? In my judgment, she has failed to come up to the legal expectation of beyond reasonable doubt and the question must be answered in the negative.

As can be seen, the defendant has failed to produce any concrete, direct or unequivocal evidence of fraud and/or fraudulent misrepresentation. The gravamen of the defence was that the plaintiff agreed to lend the defendant RM53,000 and for that purpose, it was alleged that the plaintiff

represented to the defendant that she should sign a loan agreement and surrender the title deed to the said premises to the plaintiff. At p 107 of the first segment of the notes of evidence, the defendant testified that:

> Saya tidak ada cadangan untuk menjual atau melupuskan tanah yang saya duduki atau miliki. Saya tidak pernah bercadang menjual kepada plaintif dan plaintif tidak pernah tanya tentang tanah saya itu.

The defence alleged that after negotiations in regard to the loan of RM53,000 had been completed, the plaintiff took the defendant to see a petition writer by the name of Mr Loo with the sole object of preparing a loan agreement. It must be noted that the defendant agreed that she signed an agreement dated 24 February 1990 (see pp 46-48 of bundle AABD) which was marked as 'P1' and prepared by Mr Loo, but nevertheless she said that she did not understand its contents nor did Mr Loo explain the contents of P1 to her. Of significance, the defendant agreed that she too signed the contract in exh P2 which was prepared by Mr Kee dated 6 March 1990 (see pp 56-57 of bundle AABD) and that her initials appeared in all the pages of exh P2. Again, she bluntly alleged that exh P2 was not explained to her by its author, Mr Kee. The defendant testified that she did not understand the contents of exh P2 because it was in the English language. The defendant agreed that when she signed exh P2, she had already received RM5,000 and that the plaintiff had paid Visia Finance Bhd RM20,000 to redeem the title to the said premises. The brunt of the defendant's evidence was that she went to the office of Mr Kee to sign a loan agreement, and not the sale and purchase agreement. It was said that the plaintiff represented to her that the agreement she had signed was in fact a loan agreement.

In my judgment, the defendant failed to adduce evidence beyond reasonable doubt in order to prove fraud or fraudulent misrepresentation and that defence should be rejected outright for the following reasons:

(a) it was not supported by contemporaneous documentary evidence as contemplated by the case of *The First National Bank of Chicago v Tan Lai Wah*;

(b) it was totally inconsistent and in fact, it runs counter to the sale and purchase agreement executed by the defendant in the presence of Mr Kee;

(c) it runs counter to, and in fact it goes against the grain of, the evidence of the common solicitor Mr Kee; and

(d) that defence was characterized by marked discrepancies and inherent improbabilities.

To recapitulate, and for fear of repetition, the defendant said that exh P2 was not explained to her and she did not understand its contents. She said that she did not know that exh P2 was a sale and purchase agreement wherein she had sold the said premises to the plaintiff. She further said that she did not know that she had signed the transfer of the said premises to the plaintiff. These versions, if viewed in the context of the defendant's

statement of claim in the 1991 suit where there was a reversal of role, would produce a startling result. The statement of claim in the 1991 suit — as seen at p 33 of bundle AABD particularly at paras 5 and 6 thereof — was in direct conflict with the versions as stated earlier. In para 5 of the statement of claim in the 1991 suit, the defendant pleaded that she was deceived into signing an agreement to transfer the said premises in favour of the plaintiff by way of security for a loan. This meant that the defendant knew that she was signing an agreement to transfer the said premises in favour of the plaintiff. Although in her evidence the defendant took pains to explain that exh P2 was not explained to her, yet in para 5 of her statement of claim in the 1991 suit, she emphatically stated that the plaintiff and his representative did not explain the contents of exh P2 in detail to her. In my judgment, not explaining the contents of exh P2 is entirely different from not explaining its contents in detail. The former would indicate the failure to explain at all whilst the latter would convey the message that it was explained but not in its minutest detail. Paragraph 6 of the statement of claim in the 1991 suit established, and made it clear, that the defendant knew that she had signed a transfer in favour of the plaintiff and more importantly, it was pleaded that the plaintiff agreed to re-transfer the said premises to the defendant after the loan had been settled. Paragraphs 5 and 6 of the statement of claim in the 1991 suit, when viewed in the context of the oral testimony of the defendant, show the true colours of the defendant. She was nothing more than a witness whose testimony must be viewed with circumspection as she was prepared to lie to suit her own purpose and design.

It was pleaded at para 9 of the statement of defence in the 1992 suit, particularly at p 17 of bundle 'ABP', that the reason why she sought out the plaintiff was because she was told that the plaintiff could give her a loan at a rate of interest lower than the finance company. Yet in her evidence-in-chief — as reflected at p 108 of the first segment of the notes of evidence — the defendant testified that the plaintiff specified interest at the rate of 2% per month which, on calculation, would come to 24% per year. On the other end of the scale, the interest charged by Visia Finance Bhd was 0.75% per annum above the base lending rate of 8.75%. On calculation, Visia Finance Bhd charged 9.5% per annum interest. After several adjournments, the defendant resiled and she testified that the interest chargeable by the plaintiff was 2% per annum as reflected at p 7 of the second segment of the notes of evidence.

Another inherent improbability to the story of the defendant can be seen in this perspective. The defendant testified that the plaintiff agreed to rent the front portion of the said premises and she relied on two receipts that appeared at p 3 of bundle NABD as corroboration. The first receipt marked as 'D2A' was undated and it purported to be the deposit in respect of the alleged rent. The second receipt marked as 'D2B' was dated 1 August 1990 and it purported to be the rental for the period between 1 August 1990 to 31 August 1990. But on perusal of the first segment of the notes of evidence at p 116, the defendant emphatically stated that on 26

July 1990 whilst she was in the car with the plaintiff, she was told by the plaintiff that the said premises had been transferred to his name. Here, one must not lose sight of the fact that the said premises had been transferred to the plaintiff's name on 19 July 1990, as can be seen in the title itself at p 8 of bundle AABD. Surprisingly, in the statement of claim in the 1991 suit especially at para 7 thereof (see p 33 of ABP), it was pleaded that on 30 July 1990 Mr Kee had informed her that the said premises had been transferred to the plaintiff. That being the case, we now know for a fact that the defendant knew either on 26 July 1990 or on 30 July 1990 that the said premises had been transferred to the plaintiff and consequently, it became questionable and highly improbable that the plaintiff wanted to rent the front portion of the said premises on 1 August 1990 when by that date he was already the registered proprietor of the said premises.

On the issue of the money-lending transaction that was advanced before me, I need to quote verbatim p 24 of the second segment of the notes of evidence, where it was recorded that:

Question: You said that if at all there was an agreement between the plaintiff and yourself, it was a money-lending agreement?

Answer: Yes.

Question: Do you have any documents suggesting a money-lending transaction?

Answer: I don't have the document.

I too do not have a simple letter to say that I borrowed RM53,000 from the plaintiff. Neither do I have a promissory note mentioning RM53,000 to the effect that I borrowed the money from the plaintiff.

Question: Any document specifying the terms of repayment?

Answer: No.

The transcripts of the trial do not lie. It contains the truth — and the truth of the matter is that the allegation of a money-lending transaction remains a bare allegation and nothing else.

It is of interest to note that Mr Ho Thian Cheh, the learned counsel for the plaintiff, in his thorough cross-examination revealed a facet of the issues of fraud and fraudulent misrepresentation that requires mention. By way of a cross-examination, Mr Ho Thian Cheh managed to extract information from the defendant to the effect that fraud began in March 1990 in the office of Mr Kee and this can clearly be seen at p 15 of the second segment of the notes of evidence. Now, if fraud started to rear its ugly head sometime in March 1990, it must therefore be logical to assume that what transpired in the office of the petition writer Mr Loo on 24 February 1990 that gave rise to the first sale and purchase agreement of the said premises dated 24 February 1990 as per exh P1 must be free from the taint of fraud and/or fraudulent misrepresentation. It must be emphasized that exh P1 is an agreement of sale and purchase entered into

between the plaintiff and the defendant concerning the sale of the defendant's property (the said premises) at the price of RM53,000. Exhibit P1 was prepared by Mr Loo. The only difference which is rather pronounced between exhs P1 and P2 is this: exh P1 did not address the question of obtaining approval from the state authority in regard to the disposal of the defendant's interest to the said premises; and consequently, it would be correct to say that in truth exh P1 reflected the intention of the defendant to sell the said premises to the plaintiff. It was Mr Kee who saw the need to prepare the fresh sale and purchase agreement as per exh P2 in order to incorporate that missing link. Flowing from this, I found as a fact — and it is part and parcel of my judgment — that the whole defence of fraud and/or fraudulent misrepresentation must collapse like a deck of cards. The defendant has failed to prove both fraud and fraudulent misrepresentation beyond reasonable doubt. I cannot help but feel constrained to hold that the defendant resiled from her previous intentions as seen in exhs P1 and P2 of selling the said premises to the plaintiff solely on account of the sale price. She must have realized that the sale price was far too low for her liking. She had in mind RM100,000 as reflected in her police report at 'D3' and not RM53,000. Under the law, the defendant must be held accountable under the contract and she cannot resile from it in any situation whatsoever. To borrow the words of Denning LJ in *Combe v Combe* [1951] 1 All ER 767 especially at p 770, the position of the defendant would indeed be onerous. This was what Denning LJ said:

> The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

In order to vitiate title to land, fraud as alleged by the defendant must be actual fraud. Actual fraud has been judiciously defined as 'dishonesty — a wilful and conscious disregard and violation of the rights of other persons' (per Salmond J in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* (1923) NZLR 1137 especially at p 1173); or in the words of Knox CJ in *Stuart v Kingston* (1923) 32 CLR 309 at p 329 as 'something in the nature of personal dishonesty or moral turpitude.' In *Assets Co Ltd v Mere Roihi* [1905] AC 176 at p 210, it was decided that fraud 'must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents.'

Our courts have consistently ruled that actual fraud must be proved to render an indefeasible title defeasible. I shall now demonstrate by citing a few cases. In *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371, the facts

were that the first appellant there was the registered proprietor of land and in that capacity, entered into an agreement to sell the land to the respondent, subject to the vendor obtaining a discharge of an existing charge and from the ruler-in-council, an extension of time for a building condition. Due to a delay in completion, the first appellant terminated the contract and entered into an agreement with the second appellant who subsequently became registered as proprietor. The respondent alleged conspiracy to defraud him of his interest in the land. The (then) Supreme Court was of the view that the repudiation of the contract was bad, and that the specific performance could not be granted because the purchaser had sought to vary the contract and these variations had not been accepted by the vendor. The Supreme Court also found that fraud had not been proved beyond reasonable doubt. Hashim Yeop A Sani SCJ (as he then was), speaking for the Supreme Court, said in trenchant terms (at pp 376–377):

> The onus is on the respondent ... to prove beyond reasonable doubt that there was a conspiracy to defraud between the first and second appellants. In the present case, the court must be satisfied that the circumstances in which the second appellant obtained the transfer or registration of his interest constituted not merely constructive or equitable fraud but actual fraud. The question is one of fact.
>
> It would be sufficient for the purpose of s 340(2)(a) ... for the respondent to prove that the title in the second agreement or the registration of the transfer was obtained by fraud or misrepresentation and that the second appellant was party or privy to the fraud or fraudulent misrepresentation.

And at p 380:

> It is quite clear to us that there is no evidence of conspiracy and fraud to implicate the first appellant save for the evidence of family relationship with the second appellant which in our view is insufficient even to infer conspiracy to defraud. In fact, her own evidence as witness for the plaintiff negatived all the allegations against her.
>
> The interest of the second appellant was challenged under s 340 (2)(a) in that his interest shall not be indefeasible in any case of fraud or misrepresentation to which he is privy or party. The words 'in any case of fraud or misrepresentation' would seem to cover *every* case of fraud or misrepresentation to which the second appellant is shown to be party or privy. The fraud or misrepresentation may be at the point of the execution of the agreement or at the point of registration of the interest.
>
> The case against the second appellant is substantially based on the three documents .... To succeed, the respondent must show that the statements in these documents were false and were made fraudulently for the purpose of inducing the Registrar of Titles to act in the way he did.

Since there was no evidence to support the allegation of fraud or misrepresentation, the respondent there was unsuccessful.

In *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196, the brief facts were that the former registered proprietor/respondent alleged that she had been induced by the fraud and undue influence of the first and second appellants to transfer the land to the second appellant.

A She claimed that the land had been transferred by way of security under two agreements. Under the first agreement, the transferor would not sell the land within one year without the respondent's consent; while the second agreement provided that the land would be transferred back to the respondent within one year for RM220,000. Eighteen days after the agreement was entered into, the land was transferred to the third appellant. B Later, it was transferred to a developer and sub-divided and sold to the public. The first and second appellants were advocates and solicitors and there existed a solicitor/client relationship between these appellants and the respondent. This was the basis for undue influence and consequent unconscionable behaviour on the part of these appellants who were not C able to prove their lack of undue influence. The Federal Court agreed with the trial judge that there was fraud on the appellants' part; the overall tenor of the transaction was that it was inequitable having regard to the dishonesty of the first and second appellants who colluded with the third appellant. Lee Hun Hoe CJ (Borneo) (as he then was), who delivered the judgment of the Federal Court, dismissed the appeal and concluded that the definition D of fraud in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* was appropriate. His Lordship said that (at p 201) the test propounded in *Waimiha*'s case would mean that:

> ... a registered proprietor who took a transfer with actual knowledge of an existing adverse claim against his transferor, acquired an indefeasible title as E his mere knowledge of the existence of the adverse claim did not amount to fraud.
>
> ...
>
> Fraud may also be caused by deliberately and dishonestly registering an interest and then transferring the interest even before the ink is dry to another person without the consent of the original proprietor. The ... F authorities clearly show that fraud must be actual. It must involve dishonesty of some sort. Thus fraud may occur where the designed object of a transfer is to cheat a person of an existing right or where by deliberate and dishonest act a person is deprived of his existing right.

The Federal Court then remitted the case to the High Court for assessment G of damages: see [1984] 1 MLJ 175. In due course, the appellant appealed against the assessment to the Privy Council which upheld the original assessment as against the first and second appellants: see [1986] 1 MLJ 105, where by consent the third appellant was not liable for damages.

I pause here to note and to observe that the present case before me H was not in the context of transferring the said premises to another third party without the consent of the defendant even before the ink was dry. The present case was a pure and simple transaction of the sale and purchase of the said premises from the defendant to the plaintiff. In my judgment, there was no designed object to transfer the said premises to the plaintiff by cheating the defendant of her existing right and neither was I there a deliberate and dishonest act on the part of the plaintiff to deprive the defendant of her existing right except by a valid and subsisting contract of sale as reflected in exh P2. It is also my judgment that the plaintiff was

not dishonest in his dealings with the defendant and there was no actual fraud proved beyond reasonable doubt by the defendant. A

In *Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54, Chan J rightly held that 'actual fraud must be proved in order to defeat the indefeasibility provision of the statute.' His Lordship further held that there must be actual fraud and not constructive fraud and that B the knowledge of a prior interest cannot be said to amount to fraud. Perhaps it is appropriate to set out briefly the facts of that case. There, the registered proprietor of an apartment block charged the land to the defendant bank in September 1983 and the charge was then registered. However, earlier on in June 1983, one of the purchasers of a unit obtained a housing loan from the plaintiff bank and assigned her rights in the sale C and purchase agreement to the lender. Unfortunately, since no title had been issued to the unit the charge could not be effected under the NLC. Eventually, the chargor defaulted and the land administrator ordered the land to be sold. The plaintiff bank argued that the chargee was aware, at the time of the entry of the charge, of the purchaser's interest and D consequently, it was that the chargee was guilty of fraud. On these facts, Chan J ruled that mere knowledge was not fraud and that the chargee was entitled to sell the land. On appeal to the Supreme Court, it was dismissed.

The facts in *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23 may be stated as follows. The first and second defendants were employed E by the third defendant, a bank. The plaintiff alleged that on 9 July 1973, he was induced to enter into an agreement in writing to purchase property by the false representation of the first and second defendants that the bank held title to the land as security for an overdraft. The fourth and second defendants claimed the fourth defendant was the owner of the property. The plaintiff claimed that he had contracted on the basis of this F misrepresentation and in ignorance of the need to search the register of the title, he paid a deposit. On 29 August 1973, the fourth defendant agreed to purchase the property and was registered as proprietor on 30 November 1973. On 6 November 1973, the fourth defendant's solicitor had written to the plaintiff saying that on his failure to complete the contract, the G deposit had been forfeited. Under the contract, time was not of the essence. The plaintiff replied that he would settle in four days if the fourth defendant was the owner, and in the event there was failure at reaching settlement he would rescind the contract. The plaintiff had caveated in 1973 and recaveated in 1980; in the meantime, the second caveat had lapsed. The fourth defendant gave an oral undertaking not to transfer the H land to another during the trial of the action, but nevertheless the property was sold to the fifth defendant who became the registered proprietor on 21 April 1987. In the meantime, the action against the three defendants was discontinued. The plaintiff maintained that the fifth defendant was not a bona fide purchaser for value without notice and that the sale was fraudulent. The court held that the plaintiff was not justified in withholding settlement I because a vendor does not have to certify at the date of the contract that

A he is the owner. A right to rescind was said to be lost unless that right was exercised immediately on breach. Here, the fourth defendant was said to be ready, willing and able to complete. There was no fraud because it was not enough to merely show that the transfer had deprived the plaintiff of an existing right; it must also be shown that the transfer was executed with the intention of depriving the plaintiff of his rights. Edgar Joseph Jr J (now FCJ) was of the view that the facts did (see p 34):

> ... not justify a finding that the designed object of the transfer was to cheat the plaintiff of a known existing right and a deliberate and dishonest trick to cause his interest not to be registered. There must be evidence from which a court can property infer such an intent and the Privy Council has held that the onus of proof of fraud even in a civil case in Malaysia is proof beyond reasonable doubt (*Saminathan v Pappa* [1981] 1 MLJ 121 per Lord Diplock at p 126). It is not enough to show that the transfer had *the effect* of depriving the plaintiff of a known existing right. It must be demonstrated that the transfer was executed with the *intention* of cheating the plaintiff of such right. Furthermore, it is immaterial to decide whether there were other intentions and equally immaterial to decide which was the dominant intention. The intention to cheat must be one which has a substantial influence on the decision to make the transfer.

From the authorities discussed above, one can easily discern a trend in that it is not an easy task to prove fraud beyond reasonable doubt. But fraud have been established in the following instances:

(a) where the original proprietor thought he was effecting a security transaction but instead the transferee obtained registration of a transfer: *Apoo s/o Krishnan v Ellamah d/o Ramasamy* [1974] 2 MLJ 201.

(b) where a transferee fraudulently obtained a transfer signed by the former proprietor, falsely declared to the registrar that the issue document of title had been lost, and subsequently obtained registration of the transfer to himself: *Jasbir Kaur & Anor v Tharumber Singh* [1974] 1 MLJ 224.

(c) where a former registered proprietor signed a document in English (he being able to read Chinese only) which he thought made his brother trustee of his property, but which in fact transferred the land to the brother: *Owe Then Kooi v Au Thiam Seng & Anor* [1990] 1 MLJ 234.

(d) where the transferee in collusion with the transferor acted to disregard the unregistered and uncaveated interest of third parties: *Public Finance Bhd v Narayanasamy* [1971] 2 MLJ 32.

At the end of the day, to prove fraud beyond reasonable doubt one must look at the circumstances surrounding the case. It is primarily a question of fact and it varies from case to case.

I shall now proceed to discuss the subject of misrepresentation. The first thing to note is that the treatment of misrepresentation for contracts

and that under the NLC are different. Under the Contracts Act 1950 ('the Contracts Act'), the innocent party can treat the contract as void or he can insist that the contract be performed. Section 18 of the Contracts Act defines the elements of misrepresentation, while s 19 provides for the remedies available to the innocent party. The second thing to observe is that there are two types of misrepresentation, namely: (a) innocent misrepresentation; and (b) fraudulent misrepresentation. An innocent misrepresentation is said to occur where the representation is false but made by the representor with reasonable grounds for believing it to be true at the time when it was made and at the time when the contract was entered into. The usual remedy for an innocent misrepresentation would be rescission of the contract. On the other hand, fraudulent misrepresentation is said to be a false representation made knowingly or without believing its truth, or recklessly, carelessly whether it is true or false. The fraud element that creeps in is certainly actionable in tort for deceit, whilst the contract element allows for repudiation (where the contract is executory) or for damages (where the contract is said to be executed). The third obvious thing to note is this. Under s 340(2)(a) of the NLC, misrepresentation is a separate ground of defeasibility from fraud. It must be emphasized that not all cases of fraud involve fraudulent misrepresentation but the converse is true. Thus, it is correct to say that all cases of fraudulent misrepresentation involve fraud of some kind. The fraud element in a fraudulent misrepresentation must necessarily include recklessness. In my judgment, the misrepresentation as adverted to in s 340(2)(a) of the NLC must refer to fraudulent misrepresentation and not innocent misrepresentation. It is common ground to regard innocent misrepresentation as being the result of an honest mistake. Thus, if an indefeasible title could be set aside on the ground of innocent misrepresentation then the concept of indefeasibility — the cornerstone of the Torrens system — will be under constant successful attack. It is for this reason and from the tenor of s 340(2)(a) of the NLC that misrepresentation must necessarily be restricted to fraudulent misrepresentation. Now, from the available evidence there was nothing to show the existence of fraudulent misrepresentation. Both the plaintiff and Mr Kee acted above board and it would be akin to searching for a needle in the haystack in order to look for an ingredient of fraudulent misrepresentation. In my judgment, there was no evidence of false representation made knowingly or without believing in its truth or recklessly, carelessly whether it was true or false. That being the case, the indefeasibility of the title to the said premises was not tainted at all.

An officer from the Pejabat Tanah Daerah, Johor Bahru gave evidence for the defendant. He was Encik Muhammed Ridha bin Abdul Kadir (SD2) and his evidence was clearly in favour of the plaintiff. If there was any doubt that the approval from the state authority was obtained fraudulently and/or illegally, the evidence of Encik Muhammed Ridha put an end to that speculation once and for all. Puan Ong Chee Hoon (SD3), the daughter of the defendant, attended court and gave evidence for the defendant. Her evidence did not help the defendant in any way whatsoever.

It was obvious that she was not present when exhs P1 and P2 were signed by the parties and consequently, she could not shed any light on these documents. She was not in a position to produce supportive documents to show that the transaction between the plaintiff and the defendant was a money-lending transaction. She did not positively say that the sale transaction was tainted with fraud or fraudulent misrepresentation. She seemed to point an accusing finger at Mr Kee but unfortunately she could not support her wild accusations by concrete evidence — documentary or otherwise. The private valuer by the name of Mr Chan Cheok Onn (SD4) was the last witness for the defendant and his evidence was of no relevance in so far as the issues of fraud and fraudulent misrepresentation were concerned. He gave the market value of the said premises as at 6 October 1989 to be RM70,000 whilst the forced sale value at RM49,000. If the intention of calling Mr Chan was to show to this court that the said premises was sold at an undervalue price and consequently, that amounted to fraud or misrepresentation, it was an exercise in futility. There was hardly any merit in this argument. It it my judgment that selling a property at undervalue can never amount to fraud or misrepresentation especially when, like the present case, the intentions of the parties have been put into writing in exhs P1 and P2. To confound the matter further, there was ample evidence to show that the defendant was in financial difficulties and when seen in this context, the sale price at RM53,000 appeared to be reasonable and realistic. In tabulated form, the financial distress of the defendant can be seen in:

(1) her police report where she categorically stated that '... masa itu saya kesusahan wang';

(2) her statutory declaration at p 4 of bundle AABD where it was stated that: 'Di dalam bulan Mac 1990 saya dapat kesuntukan wang ...'; and

(3) her statement of claim in the 1991 suit at para 4 of bundle ABP at p 32, it was pleaded, inter alia: 'Pada masa itu plaintif dalam kesusahan wang.'

Encik Noordin Hussin, the learned counsel for the plaintiff in the 1991 suit, argued that Chew Siew Tim knew that RM53,000 was a loan advanced to the defendant by the plaintiff. That being the case, Chew Siew Tim was a vital defence witness, yet that individual was not called to give evidence and consequently, I have no choice but to invoke s 114 (g) of the Evidence Act 1950 against the defendant: *See Keng Wah v Lim Tew Hong* [1957] MLJ 137 at p 138 and *Murugan v Lew Chu Cheong* [1980] 2 MLJ 139 at p 140.

At the end of the day, the allegations of fraud and/or fraudulent misrepresentation were entirely based on mere suspicion and conjecture which, in law, cannot amount to proof beyond reasonable doubt and per se insufficient to prove fraud (see *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34). For the reasons adumbrated above, I made the following orders:

(a) that the defendant do deliver vacant possession of the said premises to the plaintiff not later than three months from today (30 May 1996);

(b) that the defendant do pay damages at the rate of RM500 per month from 5 August 1990 right up to the date the defendant delivers vacant possession of the said premises to the plaintiff. It must be stressed that there was evidence led by Mr Ho Thian Cheh on this point through the plaintiff;

(c) interest leviable on the damages at 8% per annum from 6 August 1990 till date of payment and it is to be paid to the plaintiff;

(d) costs should rightly go to the plaintiff;

(e) the defendant's counterclaim to be dismissed with costs. This prayer serves to strengthen the order of this court (the order of my predecessor's predecessor) dated 20 April 1992 where the very same counterclaim was withdrawn as agreed by the defendant herself;

(f) in regard to the 1991 suit, I dismissed it with costs; and

(g) an order in the form of a consequential order made to the effect that the amount of money standing to the credit of the defendant's account with Messrs Mak Ng Shao & Kee be paid to the plaintiff towards the account of damages and costs.

Order accordingly.

Reported by Tee Boon Cheong